FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 20 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946.

No. [redacted] 22

INDEPENDENT EMPLOYEES ASSOCIATION OF THE NEPTUNE METER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

IRVING SWEET,
Attorney for Petitioner,
Independent Employees Association,
Office & P. O. Address,
No. 150 Nassau Street,
Borough of Manhattan,
City of New York.

LOEB APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2
Specification of Errors to Be Urged	3
Statement	4
Facts	5
Reasons for Granting Writ	9
Conclusion	20
Appendix	21

CITATIONS.

Cases:

A. E. Staley Mfg. Co. v. N.L.R.B., 127 F. (2d) 68 (C. C. A. 7)	17
Donnelly Garment Co., 151 F. (2d) 854 (C. C. A. 8)	15
Foote Bros. Gear & Machine Corp. v. N.L.R.B., 114 F. (2d) 611 (remanded 311 U. S. 620, reaffirmed 121 F. (2d) 802 (C. C. A. 7)	17
Humble Oil & Refining Co. v. N.L.R.B., 113 F. (2d) 885 (C. C. A. 5)	17
Kansas City Power & Light Co. v. N.L.R.B., 137 F. (2d) 77	12

PAGE

Keystone Steel & Wire Co. v. N.L.R.B., 155 F. (2d) 553 (C. C. A. 7) 17

Magnolia Petroleum Co. v. N.L.R.B., 112 F. (2d) 545 (C. C. A. 5) 11, 13

Mohawk Carpet Mills, 12 N. L. R. B. 765 13

N.L.R.B. v. Clinchfield Coal Corp., 145 F. (2d) 66 (C. C. A. 4) 12, 17

N.L.R.B. v. Columbian Enamelling and Stamping Co., 306 U. S. 292 18

N.L.R.B. v. Duncan Foundry & Machine Works, Inc., 142 F. (2d) 594 (C. C. A. 7) 17

N.L.R.B. v. El Paso Electric Co., 133 F. (2d) 168 (C. C. A. 5) 12, 17

N.L.R.B. v. Hollywood-Maxwell Co., 126 F. (2d) 18 (C. C. A. 9) 17

N.L.R.B. v. Standard Oil Co., 138 F. (2d) 885 (C. C. A. 2) 15, 16

Republic Aviation Corp. v. N.L.R.B., 324 U. S. 793 18

Sperry Gyroscope Co. v. N.L.R.B., 112 F. (2d) 657 (C. C. A. 2) 16

Westinghouse Electric & Mfg. Co. v. N.L.R.B., 112 F. (2d) 657 (C. C. A. 2) 15, 16

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, et seq.) .. 2
Sections 7, 8, 9(a) 21
Section 10(c) (e) (f) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

INDEPENDENT EMPLOYEES ASSOCIATION OF THE NEPTUNE METER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, Independent Employees Association of the Neptune Meter Company (hereinafter referred to as the "I.E.A.") respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on December 20, 1946 modifying and, as modified, enforcing an order of the National Labor Relations Board dated March 6, 1946.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 753-773) has not been officially reported. The findings of fact, conclusions of law and order

of the National Labor Relations Board (hereinafter referred to as the "Board") are reported in 66 N.L.R.B. 292.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on December 20, 1946 (R. 774-777). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (43 Stat. 938, 28 U. S. C. 347[a]) and Section 10(f) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. Sec. 151 *et seq.*).

Statute Involved.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151 *et seq.*) are set forth in the Appendix, *infra*, (pp. 21-22).

Questions Presented.

1. Whether a labor organization may be held to be "successor" to a prior employer-dominated labor organization where the Board found that the new organization differed structurally from the old; that its permanent officers never were identified with the old; that its meetings were held away from company premises and outside of working hours; that it was self-financed; that no officials of the company ever participated in its affairs; and where the contracts that it negotiated were beneficial to the employees whom they represented.

2. Whether, in the light of the record, it was proper to infer "successorship" from the alleged failure on the part of the company to disestablish a prior labor organization, Employees Representative Organization (hereinafter referred to as the "E.R.O.") prior to the formation of I.E.A. where the record shows that the I.E.A. was first conceived at informal meetings held in the middle of July, 1944, its first general meeting held on August 30,

1944, its constitution adopted on October 4, 1944, recognition as collective bargaining representative extended on October 14, 1944, and where the record also shows that the Trial Examiner's intermediate report in the E.R.O. case was dated September 6, 1944, received by the company on September 12, 1944, and notices of disestablishment in accordance with the intermediate report were mailed and posted throughout the company's bulletin boards by the company on September 21, 1944.

3. Whether, in dealing with a labor organization confined to the employees of a single plant, it is proper to infer "successorship" from the participation in the formative stages *only* of the new organization of some of the officers of the prior organization.

4. Whether the Circuit Court erred in its conclusion that its power to review the evidence is so "narrowly limited" that it is practically non-existent.

5. Whether the Circuit Court for the Second Circuit has not gone much further than other Circuit Courts of Appeal in upholding Board findings to the extent of making them for all practical purposes completely non-reviewable.

6. Whether the Court below did not err in disregarding the provisions of the Federal Administrative Procedure Act of 1946 in construing its power to review Board findings.

7. Whether, in the light of the record, an order of disestablishment of the I.E.A., which is tantamount to an order for its dissolution, is warranted, particularly in view of the fact that the conclusion of company domination is based, not on its activities, but only on the inferences drawn from its "premature" birth.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in its rulings on each and all of the foregoing questions.

Statement.

The complaint in this proceeding, issued by the National Labor Relations Board on March 22, 1945, arises out of a charge filed with the Board by United Electrical, Radio & Machine Workers of America (C.I.O). In general, it was charged that the Neptune Meter Company was engaged in unfair labor practices within the meaning of Section 8 (1) and (2), of the National Labor Relations Act (49 Stat. 449), in that it was alleged to have initiated, formed and sponsored a labor organization known as the Independent Employees Association of the Neptune Meter Company.

Hearings were held before the Trial Examiner in which all parties, including the I.E.A., participated. On June 16, 1945, the Trial Examiner issued his intermediate report finding the company guilty of the unfair labor practices, as charged, and recommending that it cease and desist therefrom, that it disestablish the I.E.A., and that it withdraw all recognition of the I.E.A. as collective bargaining agent for its employees. On March 6, 1946, the Board issued its decision and order adopting, with slight modifications, the report of the Trial Examiner. A motion was thereafter made by the I.E.A. to reopen the proceedings and take further evidence, or, in the alternative, that the Board order an election to determine the true wishes of the Neptune employees, or, in the alternative, for a clarification of its order insofar as the status of the independent union was concerned. This motion was denied by order of the Board dated March 29, 1946 (R. 726).

The I.E.A. filed its petition for review with the Circuit Court, as did the Neptune Meter Company. The proceedings in the Circuit Court resulted, as beforementioned, in a decree affirming the order of the Board, and granting enforcement thereof. The prevailing opinion was written by Frank, *C.J.*, and concurred in by Clark, *C.J.* The dissenting opinion was written by Swan, *C.J.*

Facts.

A group of employees of the Neptune Meter Company, led by one Koopman, an hourly-paid, non-supervisory employee, held an informal meeting in July, 1944 and decided to form an independent, unaffiliated union of the employees of the Neptune Meter Company. This meeting took place during the course of hearings conducted by the National Labor Relations Board at its regional office in New York, in a proceeding involving the same company with another organization of its employees known as the Employees Representative Organization (E.R.O.). This course was then decided on, for it became obvious to these men that the E.R.O. had been conceived and nurtured in a manner violative of the National Labor Relations Act.

This group, meeting during lunchtime, in a car parked outside the plant, designated themselves an Organizing Committee, and decided to raise a fund through the collection of initiation fees of $1.00 per person. These collections were made, and a total sum of $725.00 was collected.

At a subsequent meeting, held on July 20th, this committee decided to call the new organization the Independent Employees Association. "Thereafter the Organizing Committee distributed, outside the plant, and not in working hours, membership cards to the employees who had previously paid initiation fees" (Opinion of Frank, *C.J.*, R. 761).

On August 29th the Committee similarly distributed notices of an initial organization meeting of the I.E.A. to be held the next night, August 30th, after working hours and outside the plant (R. 234, 295-296). The minutes of this meeting show that it was attended by over 600 men and women representing a substantial majority of the employees of the company. Koopman presided at that meeting and explained that his Organizing Committee had "sounded out the employees throughout the shop and decided to become an organizing committee, *form a brand*

new independent organization, and start off with a clean slate and drop any contact with the old organization or management. The committee, therefore, undertook the organizing of that union with the conviction *that the E.R.O. was a thing of the past and would definitely not enter into their thoughts in the future* (Board's Exhibit 8, R. 523-524).

At this meeting, temporary officers were elected by a closed ballot to serve until the end of the calendar year. The Trial Examiner, in referring to these temporary officers, stated that "of those elected as temporary officers only J. Dauwalter, who was elected temporary treasurer, and Rita Mazika, who was elected temporary secretary, appeared to have been officers of, or otherwise prominent in, the E.R.O." (Trial Examiner's Report, R. 686).

The first meeting, as well as all subsequent meetings, were held away from the company premises and outside of working hours (R. 70-71, 126-148, 233, 372). These meetings were always well-attended, with full opportunity for free discussion of all subjects coming before it (R. 94, 233-234, 296-297). No supervisory employee, foreman or company official ever participated in any of these meetings (R. 147, 234, 296-297, 398-399).

By letter dated September 7, 1944, the I.E.A. demanded recognition from the company as bargaining agency for its employees (R. 401). A meeting to discuss the matter was held a week later and recognition was refused. Thereafter, the employees insisted at a general meeting that, inasmuch as it represented an overwhelming majority of the employees, recognition must be extended to their organization. The minutes of this meeting, held on October 4th and which were marked in evidence (Board's Exhibit 8, R. 523) showed that the employees, against the advice of counsel, insisted upon immediate recognition and there were threats at that meeting of a work stoppage unless such was granted. Subsequently, a meeting was held

on October 12th between the committee representing the I.E.A. and management, and after a stormy session at which there were again threats of a work stoppage (R. 280), recognition was promised, provided that proof of majority status was demonstrated. Several days later cards were produced for over 600 employees out of a total of 750 eligible (R. 394), and recognition was accordingly granted.

In the meanwhile, on September 6th, the Trial Examiner in the E.R.O. case had issued his intermediate report, recommending disestablishment of the E.R.O. and withdrawal of recognition. This report was not received by the company until September 12th (R. 605). On September 21st, in compliance with the directions contained in such report, and within the time period specified therein, notices were published on all bulletin boards throughout the plant of the disestablishment of the E.R.O. (R. 607-609; 611).

On October 6, 1944, a business agent of the Molders Union, affiliated with the American Federation of Labor, called upon the management and made vague assertions to the effect that his union represented a majority of the employees in the Foundry Division of the plant (R. 201-203). The Foundry at that time employed about 100 persons. His claim for recognition was rejected by the company. The I.E.A. representatives were apprised of the Molders Union claim at the meeting with management held on October 12th. The I.E.A. representatives advised the management that they represented "all the Foundry or the majority of the Foundry" (R. 383) and were ready to produce membership cards then and there showing such representation. Some months later, that union filed a petition for certification with the Board. No action was taken by the Board upon this petition until some time in July, 1945 when a hearing was held. Thereafter and on April 29, 1946, the Board issued its decision directing that an

election be held on May 23, 1946 among the Foundry Division employees. *Prior to the election, the Molders Union asked the Board that its name be withdrawn from the ballot.* The C.I.O., the charging union, was the only name appearing on that ballot, but was defeated by the Foundry Division employees.

After a number of meetings with management, and after full discussion by the membership, a contract governing wages, working conditions, etc. was entered into between the I.E.A. and the company on January 1, 1945 (R. 575). This contract contained benefits not previously enjoyed by the employees (R. 690, 695).

From the time of its inception down to and including the date hereof, the I.E.A. has been zealous in the protection of the rights of the employees of the Neptune Meter Company. Since its first contract it had entered into a number of other contracts in which substantial benefits were accorded to the employees.

In December, 1944, permanent officers were elected (R. 184-186). The Trial Examiner found that "none of the officers elected at that time appeared to have been officers of the E.R.O. or otherwise prominently identified with it" (Trial Examiner's Report, R. 690).

The Trial Examiner stated that these facts "standing alone (it) would not seriously challenge the legitimacy of the organization". On the basis of inferences, however, from these facts, he, and the Board, did recommend disestablishment and withdrawal of recognition. A fair summary of the Trial Examiner's view is to be found in the following quotation from this report (R. 695):

> "Although convinced and finding that the I.E.A. was initiated, sponsored and formed as a successor organization to the E.R.O., and that the influences of company domination therefore prevailed at its inception and formation, *the undersigned further finds*

that the I.E.A. as an organization differs structurally from the E.R.O. in that the constitution and bylaws of the former provide, *inter alia,* for regular meetings of the general membership, membership dues and initiation fees, and autonomy in the election of officers and further conduct of its business as a labor organization. *Officers chosen, with few exceptions, have not been prominently identified with the prior company dominated organizations.* Beginning with the organizational meeting of August 30, 1944, all of its meetings appear to have been held away from Respondent's premises and outside of working hours. No supervisors or officers of the Respondent have participated therein. The contract executed by the I.E.A. and the Respondent on January 1, 1945, appears to have been agreed upon after several bargaining conferences and incorporates certain benefits not previously enjoyed by the employees. Standing alone, it would not seriously challenge the legitimacy of the organization. *In short, it appears that the I.E.A. has made a consistent effort to divest itself of the indicia of company domination.* To effectuate the purposes and policies of the Act it appears necessary, however, that the employees be afforded a fair and full opportunity to exercise the freedom of choice guaranteed by the Act, and this can be accomplished only by a 'recreation of conditions in which genuinely free choice can be exercised.' To that end the undersigned *feels constrained,* in view of Board and Court decisions, to recommend the remedy normally applied in like cases." (Italics ours.)

Reasons for Granting Writ.

The basic questions in this case are whether, under the facts as developed at the hearing, it was proper for the

Board to find that the I.E.A. was "successor to or grew out of" the E.R.O. and whether the Court below correctly construed its powers to review Board findings in a case of this sort, holding, as it did, that this power was only narrowly theoretical and of but little practical application.

We earnestly urge that the questions here presented are novel in this respect. Heretofore, in all cases of domination and successorship that we are aware of, there were always present some elements of domination, positive and affirmative, of the independent union by the company, or of subservience to the company, to a greater or lesser degree. In this case, not a single finding of the Board points up any such evidence. The conclusion of the Board as to domination and successorship is based entirely upon inferences, and not on any of the elicited facts.

As already pointed out, we are here dealing with an organization confined to the employees of a single plant. The employees were the same, or substantially the same, during the period of activity of the former organization, the E.R.O., as during the period of activity of the I.E.A. the organization here involved. All the factual findings of the Board were on the credit side of the I.E.A. Both, the Trial Examiner, and the Board, took pains to point out that the I.E.A. meetings were largely attended, its activities were free of the slightest indicia of company domination, its activities resulted in benefits to the Neptune employees, and it at all times and from its inception enjoyed the highest confidence of those it represented. The Board, however, made its findings of company domination and successorship on two grounds. First, that some of those who initiated the I.E.A. had at one time or another held minor offices in the E.R.O. and further, that the I.E.A. was formed prior to what the Board deemed formal disestablishment of the E.R.O.

A. It Was Error to Infer Company Domination From Participation in the Formative Stages of the New Organization of Some Representatives of the Old.

Taking up first the alleged sponsorship of the I.E.A. by a group of E.R.O. representatives and officers, we should like to state that it is a well-known fact that leadership, given the opportunity, will out, whether we like it or not. Persons who are leaders are not content to sit idly by when opportunities for leadership arise. There is no rule in law, and there is none in the National Labor Relations Act, which prohibits any persons from taking the initiative in the formation of a labor organization. The only requirement laid down by the Act, and by the rules of the Board, is that these people have no connection whatsoever with management. The status of Koopman, chairman of the organizing committee, and the status of the other members of his committee, was never questioned by the Board (R. 227). They were, and are, non-supervisory employees with not the slightest connection with management.

On the matter of the participation in the new organization by some of those who were active in the old, we should like to quote from *Magnolia Petroleum Co.* v. *N.L.R.B.*, 112 F. 2d 545 (C. C. A. 5).

> "In the argument before the Court in answer to a question from the bench, whether it was the Board's contention that men who had ever been connected with a union which in the opinion of the Board was company dominated or supported, were thereby *forever debarred* from assisting to form another organization, counsel for the Board stated 'No, but the Board feels that there should be a breathing space between the dissolution of one organization and the formation of another'.

> "We find no support in the authorities nor in the Act for such a view."

Judge Swan expressed the same view in his dissenting opinion in the case at bar, when he said:

> "Naturally, it was true that some of the leaders in E.R.O. took a leading part in organizing I.E.A. If this is enough to taint the latter, I do not see how an independent union can ever be organized, for the leaders among the employees will necessarily be the initiators of the new organization."

There are a number of cases in various circuits which hold that the fact of participation in the new organization by officers and members of the old is not, in and of itself, sufficient to warrant a finding of successorship. *Kansas City Power & Light Co.* v. *N.L.R.B.*, 137 F. 2d 77 (C. C. A. 8). (Some of the officers of the old took part in the new organization.) *N.L.R.B.* v. *El Paso Electric Co.*, 133 F. 2d 168 (C. C. A. 5). (The attorney for the former organization acted as the attorney for the new organization.) *N.L.R.B.* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (C. C. A. 4). (The new organization was guided by the attorney for the former organization and by some of the officers of the old organization.)

B. The Board, and the Court Below, Have Erred in Stressing Alleged Formation of I.E.A. Prior to "Disestablishment" of the E.R.O.

As to the finding that the I.E.A. was formed prior to alleged formal disestablishment of the E.R.O., we might give the short answer that the employees were free to form a new organization as, and when, they saw fit, and second, that the company could not, even if it would, control the actions of the employees, either as to timing, or

in any other manner. Any other action on the part of the company would be an unwarranted interference with their employees' rights freely to organize under the Act.

Furthermore, a recital of the important dates in this proceeding shows conclusively that this finding is clearly erroneous.

The preliminary organizing steps took place in July and August, 1944 (R. 229-233, 517); the Trial Examiner's intermediate report was issued September 6th and received by the company September 12th (R. 474-493); posting of notices of disestablishment of E.R.O. on the fifteen bulletin boards scattered throughout the plant took place on September 21st (R. 605-612); the I.E.A. constitution was adopted October 4th (R. 500-516); recognition was granted on October 14th (R. 543).

On this score, we should again like to refer to the case of *Magnolia Petroleum Corp.* v. *N.L.R.B.*, 112 F. 2d 545, where the Court said:

> "Indeed, in *Brown Paper Mills* v. *N.L.R.B.*, 108 F. 2d 867, the contrary of that was decided. 'The Act does not compel employees to affiliate themselves nor does it prevent them from forming an independent local organization of their own', and after further saying that the Association should be completely disestablished as representative of the employees, we said: 'this does not mean, of course, that the employees may not *immediately*, provided it is with complete independence and freedom from the domination, interference or support of the management, form their own union. It certainly does not mean that they must join the organization of the complainant.'"

The same rule was laid down by the Board itself in the matter of *Mohawk Carpet Mills*, 12 N.L.R.B. 765, wherein the Board stated:

> "It is true that the movement for an independent union * * * began at a time when the Employees Representative plan was under attack as being company dominated and was participated in by employee representatives of the plan. However this circumstance is not alone sufficient to warrant a conclusion that the resulting organization is a creature of the respondent."

Evidently the Trial Examiner and the Board, in treating the subject of disestablishment of the E.R.O., felt that some formal act to effectuate this purpose was necessary on the part of both the E.R.O. and the company.

So far as any formal act on the part of the E.R.O. is concerned, we respectfully urge that, bearing in mind the character of that organization, none was necessary. The E.R.O. was a very loose organization. The employees of the Neptune Meter Company were members not because of any enrollment in the organization, but only by virtue of their employment. They paid no dues, and consequently there was no treasury, therefore no moneys to divide. They held no general membership meetings; there was, therefore, no need or occasion to hold one for the purpose of dissolving. It was not organized under any law of the State of New York; there were, therefore, no formal, legal steps to be taken looking to dissolution. The organization was simply treated by its officers as being dead (R. 518).

Insofar as action on the part of the company is concerned, the evidence is clear that it took all the necessary steps that were required of it. There was no obligation, either legal or moral, on the part of the company to take any steps *prior* to the issuance of the Trial Examiner's intermediate report. After that report was received on September 12th, full compliance was had within the ten

days set forth therein. Furthermore, when the Board's order was received, the company again, on October 21st, posted notices as required by the Board's order, in the same widely publicized manner.

In the light of the record, the case of *Westinghouse Electric Mfg. Co.* v. *N.L.R.B.*, 112 F. 2d 657 (C. C. A. 2), affirmed *per curiam*, 312 U. S. 660, so heavily relied upon by the Board has no applicability here. In that case, "the company had done nothing to mark the separation between the two" organizations, and "the employees at large had not been advised that the company was wholly indifferent whether they joined the new union." Here, the company did make the announcement required by the Board in the *E.R.O.* case.

And under the facts in this case, to put the question set forth in the case of *N.L.R.B.* v. *Standard Oil Co.*, 138 F. 2d 885 (C. C. A. 2) of " 'whether the employees have been properly disabused of the earlier influences under which—in the case at bar—they had been bargaining for the preceding nineteen years,' " is to give the answer. For over two years, despite the intensive propaganda by the C.I.O., and the pressure of the adverse decisions of the Trial Examiner, and the Board, the Neptune employees have continued to give to the I.E.A. their complete support in constantly growing membership, and by their quarters and dollars. It is safe to say here, as was said by the Court in the *Donnelly Garment Co.* matter, 141 F. 2d 854 (C. C. A. 8) (now awaiting decision by this Court, October Term, 1946, Docket Nos. 38-39):

> "Throughout this period they have been fully advised of their rights under the National Labor Relations Act. * * * In this situation, there is no room, in my opinion, for the inference that these employees have been, and continue to be, the victims of an illegal coercion by means unknown to them and too subtle to be susceptible of proof, or

for the inference that they have surrendered their right freely to choose their labor affiliation in return for the occasional inconsequential use of the Garment Company's telephones, mimeograph machines, and office facilities."

(*Of course, no such uses were even hinted at in this case.*)

C. The Court Below Did Not Properly Apply the Substantial Evidence Rule.

The Court below, by its decision, has completely destroyed the requirement of substantial evidence, and has abdicated its power to review findings of the Board.

In *N.L.R.B.* v. *Standard Oil Co.,* 138 F. (2d) 885, the Second Circuit Court took the view that a finding of the Board on the issue of successorship was "for all practical purposes not open to us at all", and that while "Theoretically * * * the Court could say that there was no 'substantial' evidence to support an order of disestablishment * * * any such reserve is not very real."

That Court took the same view in the case of *Westinghouse Electric & Mfg. Co.* v. *N.L.R.B.,* 112 F. 2d 657 (C. C. A. 2) and in the case of *Sperry Gyroscope Co.* v. *N.L.R.B.,* 128 F. 2d 922 (C. C. A. 2).

In the case at bar, the Second Circuit Court went still further. Judge Frank, writing for the majority, stated that he construes the law to be that the Court should not interfere with the Board's decision unless that decision was *"irrational"*.

We respectfully urge that this view is in conflict with the decisions of other circuits. In these other circuits, the Courts have set aside orders of the Board on the ground that they were not supported by substantial evidence where they were based upon facts much more favorable to the Board than that prevailing in the case at bar.

The Circuit Court of Appeals for the Seventh Circuit in the case of *Keystone Steel & Wire Co.* v. *N.L.R.B.*, 155 F. 2d 553 (certiorari granted by this Court November 12, 1946) recently set aside an order of the Board in a successor case on the ground that there was no substantial evidence. The Court so held despite the fact that the evidence revealed that officers in a prior company dominated union took a leading part in the formation of the new organization; that numerous witnesses testified that at the time they signed membership cards with the Alliance they did not know of the dissolution of the K.E.A.; that the company never made any public statement to its employees respecting the dissolution of the K.E.A.; that the K.E.A. treasury was transferred to the Alliance; that company supervisors expressed hostility to other unions; and that a number of supervisory employees had joined the new organization.

Despite the fact that no such testimony was adduced in the case at bar, the Second Circuit Court did sustain a Board finding of company domination.

The decision of the Court below is also in direct conflict with numerous other decisions of the Seventh Circuit Court, such as, *A. E. Staley Mfg. Co.* v. *N. L. R. B.*, 127 F. 2d 68; *N. L. R. B.* v. *Duncan Foundry & Machine Works, Inc.*, 142 F. 2d 594; *Foote Brothers Gear & Machine Corp.* v. *N. L. R. B.*, 114 F. 2d 611 (remanded 311 U. S. 620, reaffirmed 121 F. 2d 802).

Other Circuit Courts have likewise construed their powers to review much more broadly, and, in numerous instances, involving successor organizations, have set aside orders of the Board as not being based upon substantial evidence. *Humble Oil & Refining Co.* v. *N. L. R. B.*, 113 F. 2d 85 (C. C. A. 5); *N. L. R. B.* v. *El Paso Electric Co.*, 133 F. 2d 168 (C. C. A. 5); *N. L. R. B.* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (C. C. A. 4); *N. L. R. B.* v. *Hollywood-Maxwell Co.*, 126 F. 2d 18 (C. C. A. 9).

We also urge that the decision of the Court below is based upon a misconstruction and misconception of the decisions of this Court, which has clearly laid down the rule that decisions of the Board must be based upon substantial evidence. *N. L. R. B.* v. *Columbian Enamelling & Stamping Co.*, 306 U. S. 292; *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793.

D. The Decision of the Court Below Is Out of Harmony With the Federal Administrative Procedure Act of 1946.

It is respectfully submitted that the Court below completely disregarded the provisions of the Federal Administrative Procedure Act of 1946 in its estimate of its power to review, as defined in the said Act (Public Law 404—79th Congress—C. 324—2nd Session).[1]

It is apparent from the discussion on the floor of both the U. S. Senate and House of Representatives that it was the intent of this legislation to broaden the powers of review of administrative agencies by the Circuit Courts and to eliminate the conception on the part of the Circuit Courts that they had no real power to review administrative agency findings.

In its report of November 19, 1945, the Senate Judiciary Committee, referring to this legislation, stated as follows:

---

[1] Section 10(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

"The 'substantial evidence' rule set forth in section 10(e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required."

In an analysis of the Administrative Procedure Act, the Bureau of National Affairs in a pamphlet published June, 1946, cites the following colloquy on the floor of the Senate, in a discussion of the effect of Section 10(e) thereof (Congressional Record, March 12, 1946, p. 2199):

"Mr. George: The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have lead the courts to hold —and they so hold—that if there be any evidence to sustain the finding of a Board or agency, the Court has no power to interfere with it.

Mr. McCarran: I would put it in this way——

Mr. George: Would the enactment of this bill require some substantial or probative evidence to support such a finding?

Mr. McCarran: Yes.

Mr. George: Take the Labor Relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, 'We are powerless to interfere with it.' Would this bill, change that rule, if the Court were of the opinion that there was no probative evidence?

Mr. McCarran: Yes, it would change that rule.

Mr. George: I am pleased to hear it."

E. On the Facts of This Case, the Provision in the Board's Order for Disestablishment of the I.E.A. Is an Abuse of Discretion, and an Unwarranted Arbitrary Act.

The Board having found no element of company domination over the I.E.A. and the I.E.A. activities, *per se*, being beyond criticism, this Court should set aside the order of disestablishment which is, in effect, an order for dissolution, inasmuch as the Board has made it a firm policy never to certify a disestablished union. In view, further, of the firm desire on the part of the Neptune Company employees to be represented by the I.E.A., to permit the order of disestablishment to stand, would deprive these employees of the rights guaranteed to them under the Act freely to organize and to choose a collective bargaining representative of their own choice.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

INDEPENDENT EMPLOYEES ASSOCIATION OF THE NEPTUNE METER COMPANY,

By IRVING SWEET,
Counsel for Petitioner.

APPENDIX.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

* * * * *

Sec. 8. It shall be an unfair labor practice for an employer——

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of

employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

Sec. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."